United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

ORIGINAL

74-1037

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P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN DELLA CAVA,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

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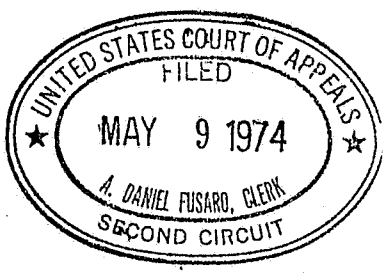
DEFENDANT-APPELLANT'S BRIEF



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Cases Cited

POINT I

THE GOVERNMENT'S RELIANCE ON THE RECENT SUPREME COURT CASE DEFINING THE PERMISSABLE SCOPE OF A WARRANTLESS SEARCH OF THE PERSON OF AN ARRESTEE IS MISPLACED (Replying to Appellee's Point III)

The Government cites the recent Supreme Court case, United States v. Edwards, 42 U.S.L.W. 4463 (decided March 26, 1974), as support for the search of appellant's automobile following his arrest and the vacuum-mutilation search of the gym bag five days later. Although it may be true that this case and the preceding cases of United States v. Robinson, 14 Cr. L. 3043, and Gustafson v. Florida, 14 Cr. L. 3056 (both decided 12/11/73), have gone so far as to permit a reasonable, albeit warrantless, search of the person of an arrestee following his arrest, nothing in the holding of these cases applies to the arrestee's house, automobile, or other place of arrest. Edwards holds that the clothing of an arrested person, which might be seized at the time of arrest, and incident to it, as evidence of the crime in plain view, could also be seized ten hours after the arrest while the defendant was in police custody. Robinson had held that an arrested person was subject to a search of his clothing following arrest. Edwards was careful to confine itself to the "personal effects," and personal belongings in the immediate possession of the defendant at the time of arrest and cited generally to "clothing" seizure

cases in support of its position. United States v. Caruso, 358 F. 2d 184 (2d Cir., 1966); Hancoch v. Nelson, 363 F. 2d 249 (1st Cir., 1966); Golliher v. United States, 362 F. 2d 594 (8th Cir., 1966); Uhalem v. United States, 346 F. 2d 812 (D.C. Cir., 1965); Robinson v. United States, 283 F. 2d 508 (D.C. Cir., 1960); United States v. Williams, 416 F. 2d 4 (5th Cir., 1969); Evalt v. United States, 382 F. 2d 424 (9th Cir., 1967) (pack sack taken from the person). Indeed, the Court cited with approval and quoted as summing up the "essence of situations like these," the case of United States v. DiLeo, 422 F. 2d 487 (1970), wherein the First Circuit specifically distinguished searches of the person from searches of the place of arrest. Said the Circuit

> We recognize that the range of Fourth Amendment cases and the pertinent language of the Court, from Agnello ... to Preston ... have generally dealt with searches of cars, rooms, offices and homes, but not of a person shortly after being arrested and conducted to a police station .... We read Chimel as being acutely concerned about the increasing legitimation of wide-ranging warrantless searches of lodgings and buildings, based on the fortuity of arrest on the premises... The difference between the situation in Chimel and that in the case before us is this: the arrest of a suspect in a particular place - be it his apartment, office, or house - has no such nexus with that place as, without more (i.e., a valid search warrant), would justify searching the premises ... 422 F. 2d at 492-493. (emphasis supplied).

Thus, as to the place of arrest (and the automobile was included, see the above quotation), as distinguished from the person, a

search needs greater justification than the mere fact of the suspect's arrest there (see appellant's main brief). Edwards cites DiLeo and approves this distinction, even as it refers to Cooper v. California, 386 U.S. 58 (1967) as an example of a situation in which the extra reason for the search of the place, the car, was extant. In Cooper, as in the other cases cited by the Government in its brief in this case,* the car was known to be the very specific instrumentality of the crime for which the defendant was arrested, and not merely the place of the arrest as it was in this case. Since it was clear in this case, as testified by the arresting and searching officers at the hearings below, they had no specific information about the car in which appellant was riding on the night of the arrest; they had no probable cause to search it; no warrant to search it, and as the place of arrest, no authority to seize and destroy its contents.

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* Francolino, Spero - McKendrick, Ortega, Mazzochi and Young. (Government's brief at 59-62, page proofs).

POINT II

ACCORDING TO THE FEDERAL RULES, APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS THE FEBRUARY CAR SEARCH EVIDENCE WAS TIMELY AND THE GOVERNMENT INCORRECTLY CITES THE RULES AND AN OPINION OF THE COURT AS A POSSIBLE FINDING OF PROBABLE CAUSE FOR THAT SEARCH (Replying to appellee's point II(5))

The Government refers in its brief to the old Rule 41(e) in arguing that appellant's motion to suppress (on probable cause grounds) the testimony about the money seized in February, 1972, was untimely made. They quote the language "shall be made before trial or hearing" (p. 54) and argue that the motion was made during one of the several pre-trial hearings in the case, and not before the hearing. However, the new Rule 41 contains no such "pre-hearing" prescription on the making of motions. Rule 41 now refers to Rule 12 for the time of making motions, and that Rule now states,

> Defenses and objections based on defects in the institution of the prosecution ... may be raised only by motion before trial. (emphasis added).

As we have argued in the main brief, the motion was made well before trial, and the only case law cited by the Government are cases of motions made during, or on the first day of, trial. Both the new rules and the cases cited by the Government assume that a good faith motion

on a substantial issue made well before trial should be entertained. Here the motion was so made first in appellant's written papers and then reiterated orally when the Government announced its intention to use the testimony about the money. In their footnote at page 55, the Government concedes that appellant in his written papers did refer to, and rely upon, the written motion made by Guarino on these grounds. The fact that the Court ultimately denied relief to Guarino on standing grounds, does not erase appellant's making of the motion as to himself by incorporation by reference of the substantive arguments made in the Guarino motion.

Finally, the Government misquotes the Court below out of context as having found as a fact that the conversations relied on for probable cause in this case, "very likely had to do with narcotics transactions". (Appellee's brief at 56). In fact, a full quotation shows that the Court found the opposite, if it found anything, on this issue.

> Looking back over the eavesdropping record, we are advised and guided as to the words of this nature. For those involved in the police effort at the time, the task was less simple. There was no glossary to tell in advance that the references, to 'chess' and to 'a little friend' very likely had to do with narcotics transactions. There was no clue to tell right off that a person announcing he was 'sick' meant he was unable to deliver narcotics. (JA-214).

POINT III

DETECTIVE EATON DID TESTIFY AT THE HEARINGS BELOW THAT HE TOLD DISTRICT ATTORNEY FISHMAN, PRIOR TO THE WIRE-TAP APPLICATION THAT HE WOULD HAVE DIFFICULTY IDENTIFYING THE VOICE OF JOSEPH DELLA VALLE (Reply to appellee's Point II(2))

The Government states at page 42, footnote, that Detective Eaton never confessed to District Attorney Fishman that he would have difficulty identifying Della Valle's voice. In fact, he did so testify.

Q. You indicated to District Attorney Kaufman and Fishman that you would have a problem identifying the voice of Joseph Della Valle, is that correct?

A. That is correct.

Q. You indicated that to them on December 8, 1971, prior to the time they went in to see the judge?

A. That was to Mr. Fishman.

Q. You indicated that to him?

A. Yes.

Q. As a matter of fact, during the entire course of the investigation and the preparation of the search warrant or the electronic eavesdropping papers, you indicated you would have difficulty listening or hearing the voice of Joseph Della Valle, is that correct?

A. Distinguishing it.
(H. rda 89, also numbered 991)

Q. Isn't it a matter of fact that you testified earlier that you had difficulty hearing the voice of Joseph

Della Valle and might have difficulty listening to it again and identifying it?

A. That is correct, I did say that.

Q. You told this to the district attorneys?

A. I did, right.

Q. You didn't put it in your affidavit?

* * *

A. I don't think it was placed in any of the affidavits, that is correct.
(H. rdr 47, also numbered as 1099-1100)

CONCLUSION

FOR THE ABOVE STATED REASONS AND THE REASONS AND ARGUMENTS OF APPELLANT'S MAIN BRIEF, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of May, 1974 at No. Md Courthouse, D.C. deponent served the within Brief upon M. Satterwhite, the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 9 day of May 1974

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973